



221 E. Fourth Street
P.O. Box 2301
Cincinnati, OH 45201-2301

September 17, 2018

Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: Ex Parte Communication, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84; Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79

Dear Ms. Dortch:

Cincinnati Bell Inc. (“Cincinnati Bell”) commends the Commission on its recent actions to accelerate the buildout of wireless and wired infrastructure to advance the deployment of broadband networks across the country, especially in rural markets.¹ The draft Declaratory Ruling is another important step to secure America’s broadband future.² Cincinnati Bell is concerned, however, that the Draft Ruling may inadvertently tilt the playing field towards wireless networks and not unambiguously apply the same statutory principles to fiber deployments, including those fiber deployments necessary to support wireless broadband services.

¹ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, FCC 18-111 (rel. Aug. 3, 2018); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79, FCC 18-30 (rel. Mar. 30, 2018); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling and Further Notice of Proposed Rulemaking, 32 FCC Rcd. 11128 (2017); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, 32 FCC Rcd. 9760 (2017).

² See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Barriers to Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC-CIRC1809-02 (Sept. 5, 2018) (“*Draft Ruling*”).

Cincinnati Bell urges the Commission to modify the Draft Ruling to apply its Section 253(a) and 253(c) guidance and rulings to state and local government regulation of wired broadband networks as well as Small Wireless Facilities. This revision is necessary to achieve the Commission's broadband deployment goals and would be consistent with the record and reasoned decision making, and supportable upon judicial review.

Cincinnati Bell Inc.

Cincinnati Bell delivers integrated communications over its fiber-optic and copper networks that include high-speed Internet, video, and voice solutions. Cincinnati Bell understands that high-speed broadband Internet access is a critical ingredient to economic development efforts, and has invested over \$1 billion into its fiber network since 2009 to support exponentially growing data usage in the Internet of Things economy.

Cincinnati Bell has deployed more than 10,900 fiber route miles in Greater Cincinnati and the company had approximately 22,500 commercial buildings lit with fiber at the end of 2017. Cincinnati Bell had the capability to provide fiber-based services to 589,200 residential and business addresses – or approximately 72 percent of Greater Cincinnati – through the second quarter of 2018.

Cincinnati Bell also provides backhaul for small cell wireless services, using a turnkey solution for wireless carriers. The company has built out a small cell network of 200 sites with one large wireless operator, with a target to scale the network for a total of 250 sites. In addition, Cincinnati Bell provides fiber and other services to roughly 70 percent of the 1,100 cell towers in Greater Cincinnati.

Cincinnati Bell continues to invest in both stand-alone fiber deployments as well as fiber deployment to traditional macro cell sites and Small Wireless Facilities.

The Draft Ruling states that the “interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment” acknowledging that although “the relevant language of Section 253(a) ... is not limited just to Small Wireless Facilities,” the Commission has the discretion to “proceed incrementally.”³

But proceeding incrementally here unnecessarily disadvantages fiber-based providers that will be providing fiber backhaul to as well as competing with new 5G based wireless broadband services. The proposed construction of the “effective prohibition” standard of Section 253(a), including the re-affirmation of *California Payphone*, the limitations on state local right-of-way (“ROW”) fees, including the interpretation of the terms “fair and reasonable” and “competitively neutral and nondiscriminatory” and the presumption regarding gross revenue fees are key to removing barriers to construction of all fiber networks, whether or not they support Small Wireless Facilities. At a minimum, sound decision-making, as well as the text and structure of Section 253, require the Commission to apply its interpretation of these key statutory principles and terms on a

³ Draft Ruling n.152.

nondiscriminatory basis to deployments of wired broadband infrastructure and not just Small Wireless Facility deployments.

Cincinnati Bell does not disagree that the deployment of Small Wireless Facilities “raise different issues than the construction of large, 200 foot towers” for 3G/4G wireless service.⁴ But they do raise many of the same issues that fiber providers encounter, particularly when deploying fiber to the premises like Cincinnati Bell. The 5G model, using Small Wireless Facilities is a deeper penetration model, reliant on a distributed network like wireline and often built using wireline connectivity. In other words, the 5G networks the Commission seeks to unshackle are using fiber cables, pole attachments, and ROW in utility corridors just like wireline networks.⁵

The Commission recognizes that the purpose of Section 253 is to foster facilities-based competition while “guard[ing] against competitive disparities.”⁶ It would be inconsistent with this statutory purpose for the Commission to adopt interpretations of Sections 253(a) and 253(c) that promote disparities and are inconsistent with statutory principles of competitively neutrality and nondiscrimination.

The Commission’s *California Payphone* Standard Should Apply to Fiber-Only Deployments, Not Just Small Wireless Facility Deployments

The Draft Ruling reaffirmed as the Commission’s “definitive interpretation of the effective prohibition standard, the test [it] set forth in *California Payphone*, namely, that a state or local legal requirement constitutes an effective prohibition if it ‘materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.’”⁷ The Commission would thus confirm the principle “that under this analytical framework, a legal requirement can ‘materially inhibit’ the provision of services even if it is not an insurmountable barrier.”⁸ But as explained in note 152, this interpretation appears limited to Small Wireless Facility deployments.⁹

Without clarifying that this re-affirmation of the Commission’s *California Payphone* standard applies with equal force to both wired network deployments and Small Wireless Deployments it is not clear that such standard promotes the “fair and balanced legal and regulatory environment” at the heart of *California Payphone*.¹⁰

Cincinnati Bell’s competitors such as AT&T and Verizon have both declared their intention to offer 5G broadband services. AT&T’s CFO indicated that AT&T will deploy

⁴ Draft Ruling ¶ 3.

⁵ *Id.* ¶ 24.

⁶ *Id.* ¶ 52.

⁷ *Id.* ¶ 34.

⁸ *Id.*

⁹ *Id.* n.152.

¹⁰ *Id.* ¶ 16.

its mobile 5G service in dense, city blocks, rather than residential broadband offerings in the suburbs.¹¹ Verizon just this week announced its intention to offer “5G Home,” a residential broadband service offering broadband speeds between 300 Mbps and 1 Gbps, in several markets.¹² Both AT&T and Verizon are both launching 5G services in Indianapolis where a Cincinnati Bell subsidiary provides service. Cincinnati Bell welcomes competition but is concerned that the Commission is proposing to streamline Wireless Carriers’ deployment of their 5G networks while Cincinnati Bell’s fiber deployment remains entangled in the thicket of state and local regulatory impediments, including excessive fees, such as gross revenue fees.

The Commission Should Adopt a Uniform Interpretation of Local Government Fees for Wireline Networks and Small Wireless Facilities Under Section 253(c)

Cincinnati Bell is encouraged that the proposed Draft Ruling would clarify that under Section 253(c) the fees assessed for use of the ROW cannot exceed a reasonable approximation of the local government’s objectively reasonable costs. Cincinnati Bell further applauds the proposal to clarify that gross revenue fees will typically not comply with Section 253(c) unless such revenue amounts to a reasonable approximation of the local government’s reasonable costs.¹³ These are sound interpretations of the statute. But Cincinnati Bell is alarmed that the Draft Ruling does not clearly articulate that its reasoning with respect to this statutory interpretation governs with equal force when a carrier deploys fiber in the local government ROW.

The Draft Ruling’s disparate treatment of fees is particularly problematic for Cincinnati Bell. As the Commission recognizes, the Sixth Circuit in *TCG v. Dearborn*,¹⁴ upheld a lower court judgment that Dearborn’s 4% gross revenue fee imposed on TCG was not preempted under Section 253, despite the fact that TCG’s primary competitor was not subject to such a fee.¹⁵

The Draft Ruling clarifies that the Commission’s construction of Section 253(c) would prohibit the use of gross revenue fees for Small Wireless Facility deployments since “gross revenue fees generally are not based on the costs associated with an entity’s use of the ROW and where that is the case, are preempted under Section 253(a).”¹⁶

¹¹ See Attachment A, Dan Jones, “For AT&T, 5G Is a City Kitty, Not a Residential Fat Pipe,” <https://www.lightreading.com/mobile/5g/for-atandt-5g-is-a-city-kitty-not-a-residential-fat-pipe-/d/id/745211>.

¹² See Attachment B, Nick Statt, “Verizon will launch 5G home internet service starting October 1st,” The Verge, viewed Sept. 12, 2018, <https://www.theverge.com/platform/amp/2018/9/11/17847640/verizon-5g-first-home-broadband-internet-service-installations-october-1>.

¹³ Draft Ruling ¶ 11.

¹⁴ *Id.* n.107 citing *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 625 (6th Cir. 2000).

¹⁵ *TCG Detroit v. City of Dearborn*, 206 F.3d at 624-25.

¹⁶ Draft Ruling ¶ 67.

Marlene H. Dortch, Secretary

September 17, 2018

Page 5

Unless the Commission revises the Draft Ruling the local governments within the Sixth Circuit that Cincinnati Bell negotiates with to deploy fiber in the ROW will continue to demand gross revenue fees from Cincinnati Bell with respect to its fiber deployments. Wireless companies such as Verizon, however, will be able to use the Commission's ruling to avoid such gross revenue fees and obtain a competitive advantage in the market against its wired network competition.

The Draft Ruling is a positive step forward to facilitating further broadband deployment. But to be consistent with Section 253(c) the Commission must modify the Draft Ruling so that its interpretations of the language in Sections 253(a) and 253(c) apply with equal force to both wireline networks and Small Wireless Facilities.

Respectfully Submitted,

/s/ Ted Heckmann

Ted Heckmann
Senior Director
Regulatory & Government Affairs
Cincinnati Bell, Inc.

Enclosures